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7 Attorneys for Plaintiff Terri Jo Neff

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

9 **IN AND FOR THE COUNTY OF COCHISE**

10 TERRI JO NEFF, a single woman,

No. CV201900323

11 Plaintiff,

12 vs.

13 COCHISE COUNTY; COCHISE COUNTY
14 BOARD OF SUPERIVORS; ARLETHE
15 RIOS, COCHISE COUNTY CLERK,

16 Defendants.

17 **PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S STATUTORY SPECIAL
ACTION COMPLAINT
(ORAL ARGUMENT REQUESTED)**

Assigned to the Hon. David Thorn, Div. III

18 Plaintiff Terri Jo Neff, by and through her attorney undersigned, hereby responds to
19 Defendants' Motion to Dismiss. The sole issue in this case is the question of whether a retainer
20 agreement between the County and a private law firm hired to represent the County Board of
21 Supervisors is protected by the Arizona attorney-client privilege, A.R.S. § 12-2234. The law
22 makes clear that retainer agreements are not covered by the attorney-client privilege. It therefore
23 should have been disclosed pursuant to Plaintiff's public records request. For these reasons,
24 Defendants' Motion to Dismiss should, in all respects, be denied.
25
26

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. BACKGROUND AND FACTUAL MATTERS**

3 The facts in this case are not in dispute.

4
5 On February 19, 2019, a civil action was filed against the Cochise County Board of
6 Supervisors, contesting the appointment of Pat Call as Justice of the Peace for Precinct 5
7 (Complaint ¶ 6) The Cochise County Attorney's Office arranged for a private law firm, the
8 Jellison Law Offices PLLC, to represent the County Board in that lawsuit. (Complaint ¶ 7)

9 Plaintiff Terri Jo Neff is a freelance journalist. On April 12, 2019, Plaintiff filed a request
10 for various categories of documents. This included the retainer agreement between Cochise
11 County and the Jellison Law Offices. Plaintiff also sought invoices reflecting demands for
12 payment submitted by Jellison, and records showing what funds were paid to him. (Defendant's
13 Motion to Dismiss, Exhibit A). Cochise County refused to disclose any of these documents,
14 asserting that all such documents were covered by the attorney-client privilege.
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17 On July 30, 2019, Plaintiff brought this lawsuit. This lawsuit seeks *only* the retainer
18 agreement between Cochise County and the Jellison Law Offices. The lawsuit does not seek
19 invoices, billing records, or other documents.

20 **II. THE RETAINER AGREEMENT MUST BE DISCLOSED PURSUANT TO**
21 **PLAINTIFF'S PUBLIC RECORDS REQUEST.**

22 **A. The Arizona Public Records Law.**

23 The Arizona public records law, A.R.S. § 39-121, *et seq.*, mandates that all public records
24 and other matters in the custody of any officer shall be open to the public for inspection at any
25 time. The Arizona public records law is extremely broad and establishes a presumption in favor
26

1 of disclosure of public records. *Carlson v. Pima County*, 141 Ariz. 487, 490-491, 687 P.2d 1242,
2 1245-1246 (1984); *Griffis v. Pinal County*, 214 Ariz. 1, 5, 156 P.3d 418, 422 (2007); *Congress*
3 *Elementary School Dist. No. 17 v. Warren*, 227 Ariz. 16, 251 P.3d 395 (Div. 1, 2011). The
4 definition of public records includes all records reasonably necessary or appropriate to maintain
5 an accurate knowledge of the public official's activities. A.R.S. § 39-121.01(B). The enactment
6 of the Arizona public records law was intended to codify Arizona's pre-existing policy
7 mandating disclosure, except where the interests of privacy, confidentiality or the best interests
8 of the State in carrying out its legitimate activities, outweigh the general policy of open access.
9 The Arizona statute and case law "evidence a clear policy favoring disclosure." *Carlson*, 141
10 Ariz. at 490-491, 687 P.2d at 1245-1246.

13 The types of materials subject to disclosure under the Arizona public records law are
14 extremely broad. Examples of the types of records which must be disclosed pursuant to the
15 Arizona public records law are included in Section 6.3 of the Arizona Attorney General Agency
16 Handbook, page 6 through 7.¹ Records to be disclosed include, *inter alia*, records of
17 expenditures of public monies and books of accounts of public entities. *Id.* See also, Attorney
18 General Op. 70-1 (records of expenditures of public funds are public records) (Exhibit 1).
19 Clearly, a contract entered into by Cochise County to obtain legal services from a private law
20 firm, mandating the expenditure of public funds, is a public record.
21
22

23
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25
26 ¹ The Arizona Attorney General is required to publish a handbook to advise all public entities
about their obligations under the public records law. A.R.S. § 41-192(A)(8). It is available online
at www.azag.gov/outreach/publications/agency_handbook.

1 There is no question but that the retainer agreement sought by Plaintiff is a public record.
2 Indeed, Defendants do not argue to the contrary.

3 **B. The Retainer Agreement is not covered by the Arizona attorney-client privilege.**

4 Arizona law mandates that “communications” between an attorney and a client are
5 privileged. This protection is mandated in both the civil (A.R.S. § 12-2234) and criminal (A.R.S.
6 § 13-4062(A)(2)) law. The crux of both privileges is to protect “communications” between the
7 attorney and a client. *Id.*

8
9 The defendants’ Motion to Dismiss *assumes* that a retainer agreement is such a privileged
10 communication. Their motion simply begs the question. The defendants cited no case law
11 holding that retainer agreements are subject to the attorney-client privilege. Indeed, they cannot.
12 Case law throughout the United States, including the Ninth Circuit construing Arizona law,
13 makes clear that retainer agreements are *not* confidential communications covered by the
14 attorney-client privilege. Moreover, Arizona cases, *in dicta*, make clear that Arizona will
15 certainly follow the unanimous case law in this regard.

16
17 In *Clarke v. American Commerce National Bank*, 947 F.2d 127 (9th Cir. 1992), the Office
18 of the Comptroller of Currency sued to enforce an administrative subpoena issued to a bank for
19 production of attorney billing statements. The bank sought to prevent disclosure, arguing that
20 the documents fell within the attorney-client privilege. Citing earlier case law, the Ninth Circuit
21 held that the basics of the retainer agreement between the parties are not covered by the attorney-
22 client privilege:
23
24

25 Our decisions have recognized that the identity of the client, the amount of the fee,
26 the identification of payment by case file name, and the general purpose of the work
performed, are usually not protected from disclosure by the attorney-client privilege.

1
2 *Clarke*, 974 F.2d at 129 (citations omitted).

3 In *Hoot Winc, LLC v. RSM McGladrey Financial Process Outsourcing, L.L.C.*, 2009 W.L.
4 3857425 (Exhibit 2), the District Court ordered disclosure of a retainer agreement. The Court,
5 citing settled case law, squarely held that retainer agreements are not within the attorney-client
6 privilege:

7
8 ...the Ninth Circuit has repeatedly held retainer agreements are not protected by
attorney-client privilege or work-product doctrine.

9
10 The question of whether retainer agreements are covered by the attorney-client privilege
11 frequently comes up in criminal cases. The issue arises in circumstances where the government
12 seeks the identity of the fee payer and the nature of the agreement in drug cases. The Ninth
13 Circuit has repeatedly held that as a general rule, such retainer agreements are not protected by
14 the attorney-client privilege. *United States v. Blackman*, 72 F.3d 1418 (9th Cir. 1995); *Ralls v.*
15 *United States*, 52 F.3d 223, 225 (9th Cir. 1995)² (...the attorney-client privilege does not
16 safeguard against the disclosure of either the identity of the fee payer or the fee
17 arrangement...this is so because the attorney-client privilege applies only to confidential
18 communications, and the payment of fees is usually incidental to the attorney-client
19 relationship).³
20
21

22
23
24 ² *Ralls* was construing an Arizona attorney-client retainer agreement. The Arizona statute
25 providing for the attorney-client privilege in the criminal context is virtually identical with the
Arizona statute in the civil context. Compare A.R.S. § 13-4062(A)(2) with A.R.S. § 12-2234.

26 ³ In both *Ralls* and *Blackman*, the Court noted a limited exception where identifying the fee payer
would constitute the final step in establishing criminal liability against the fee payer. The basis

1 In *Paul v. Winco Holdings, Inc.*, 249 F.R.D. 643 (D. Idaho 2008) (Exhibit 3), an employee
2 sued, alleging the employer had breached fiduciary duties under various federal statutes. The
3 Plaintiff sought the retainer agreement between the employer and its law firm. The District Court,
4 citing *Clark v. American Commerce National Bank, supra*, specifically held that the retainer
5 was *not* covered by the attorney-client privilege:
6

7 The Ninth Circuit has stated that communications between attorney and client that
8 concern “the identity of client, the amount of the fee, the identification of payment
9 by case file, and general purpose of work performed are usually not protected from
disclosure by the attorney-client privilege.

10 249 F.R.D. at 654.

11 The Eighth Circuit reached an identical conclusion in *Diversified Industries, Inc. v.*
12 *Meredith*, 572 F.2d 596 (8th Cir. 1977). In *Diversified*, the Court considered whether a
13 memorandum that essentially established the relationship between Diversified and its law firm
14 was subject to disclosure in response to an interrogatory. The Eight Circuit, in crystal clear
15 language, held that the document in question was not covered by the attorney-client privilege:
16

17 We have no difficulty in upholding the action of the District Court in refusing to
18 accord protection to law firm’s memorandum of June 19, 1975. That memorandum
19 contained no confidential information. It did little more than reveal the relationship
20 between the parties, the purpose for which law firm had been engaged, and the steps
which the firm intended to take in discharging its obligation to diversify. Such a
document is *not* privileged. (emphasis added)

21 *Diversified Industries, Inc. v. Meredith*, 572 F.2d at 603 (citations omitted).
22
23
24

25
26 for non-disclosure in such cases is not that the retainer is ordinarily privileged, but that in certain
circumstances, disclosure of the fee payer would reveal the fee payer’s motivation to pay, *i.e.*,
his/her own criminal liability. Such cannot be an issue herein.

1 State courts that have addressed the issue have likewise squarely held that retainer
2 agreements are not covered by the attorney-client privilege. In *Matter of Priest v. Hennessy*, 431
3 N.Y.S.2d 511, 51 N.Y.2d 62, 409 N.E.2d 983 (N.Y. 1980), attorneys were subpoenaed to testify
4 before the grand jury concerning their representation of various clients. The attorneys moved to
5 quash the subpoenas, citing the attorney-client privilege. The Court held that fee arrangements
6 between an attorney and client are not privileged:
7

8 The fee arrangements between attorney and client do not ordinarily constitute a
9 confidential communication and, thus, are not privileged in the usual case...a
10 communication concerning the fee to be paid has no direct relevance to the legal
11 advice to be given. It is a collateral matter which, unlike communications which
12 relate to the subject matter of the attorney's professional employment, is not
13 privileged.

14 *Hennessey*, 409 N.E.2d at 986-987. See also, *People v. Belge*, 399 N.Y.S.2d 539, 540 59 A.D.2d
15 307, 308 (1977) (The terms of the attorney's retainer agreement are not privileged); *Matter of*
16 *Glines v. Estate of Baird*, 16 A.D.2d 743, 227 N.Y.S.2d 71; *Registered County Home Builders*
17 *v. Lachantin*, 10 A.D.2d 721, 198 N.Y.S.2d 767; *People v. Cook*, 82 Misc.2d 875, 372 N.Y.S.2d
18 10 ("In our opinion, the terms of the retainer, as to the attorney's compensation, were not
19 privileged within the meaning of Section 353 of the Civil Practice Act.")

20 The Supreme Court of Utah reached an identical conclusion in *Gold Standard, Inc. v.*
21 *American Barrack Resources Corporation*, 801 P.2d 909 (Utah 1990). In *Gold Standard*,
22 relating to the sale of a mine, Plaintiff moved to compel production of a letter from the
23 defendants to their attorney. The defendants sought to preclude disclosure citing the Utah
24 attorney-client privilege. The Utah statute, like Arizona's, precluded disclosure of any
25 "communication" between the attorney and client. The Supreme Court of Utah, like every other
26

1 court that considered the issue, had no difficulty in concluding that the retainer agreement was
2 not privileged:

3 Retainer agreements are not generally protected by the attorney-client privilege. The
4 items commonly contained in them, describing the external trappings of the
5 attorney-client relationship, are not confidential.

6 *Gold Standard, Inc.*, 801 P.2d at 911.

7 While Arizona courts have not directly addressed the question of whether a retainer
8 agreement is within the attorney-client privilege, they have, on several occasions, construed
9 related questions. On each occasion that they have done so, the Courts have ruled that the
10 privilege did not apply. Those rulings make clear that Arizona, like every other Court which has
11 construed the issue, will conclude that the retainer agreement Plaintiff Neff seeks to obtain in
12 this case is not protected by the attorney-client privilege and must be disclosed.
13

14 In *Granger v. Wisner, M.D.*, 134 Ariz. 377, 656 P.2d 1238 (Sup. 1982), Plaintiff sued the
15 defendant cosmetic surgeon for malpractice. Counsel for the Plaintiff had previously consulted
16 with a doctor who had opined that no malpractice had occurred. At trial, the defense called as a
17 witness the expert Plaintiff's counsel had consulted. On appeal, Plaintiff objected, claiming that
18 calling the expert violated the attorney-client privilege. The Supreme Court, citing earlier cases
19 noted that the attorney-client privilege did not extend to matters that did not involve confidential
20 communications:
21

22 ... the statute [A.R.S. § 12-2234] protects 'communications' from the client and the
23 'advice' to the client. It does not extend to facts that are not part of the
24 communication between the lawyer and client. Thus, the fact that a client has
25 consulted an attorney, the identity of the client, and the dates and number of visits
26 to the attorney are normally outside the scope and purpose of the privilege...

Granger v. Wisner, 134 Ariz. at 379-380, 656 P.2d at 1240-1241.

1 *Granger* was relied upon in *Ulibarri v. Superior Court in and for County of Coconino*,
2 184 Ariz. 382, 909 P.2d 449 (Div. 1, 1995). In *Ulibarri*, the Plaintiff sued her former psychiatrist
3 for medical malpractice, alleging non-consensual sexual relations. The psychiatrist claimed that
4 the Plaintiff had threatened him with blackmail earlier, claiming that she had consulted with an
5 attorney about the affair. Ulibarri denied making those statements. Citing *Granger v. Wisner*,
6 the *Ulibarri* Court concluded that the defendant was entitled to establish the fact that Ulibarri
7 had consulted with counsel:
8

9 The privilege protects *communication* between lawyer and client [“[i]t does not
10 extend to facts which are not part of the communication between the lawyer and
11 client. ...Thus, the fact that a client has consulted with an attorney, the identity of
12 the client, and the dates and number of visits to the attorney are normally outside
the scope and purpose of the privilege.

13 *Ulibarri*, 184 Ariz. at 385, 909 P.2d at 452.

14 Finally, in *State Farm Mutual Automobile Insurance Company v. Lee*, 199 Ariz. 52, 13
15 P.3d 1169 (Sup. 2000), a class action was brought alleging bad faith by State Farm. State Farm
16 defended, *inter alia*, by indicating that they had relied, in part, on advice from their attorneys in
17 proceeding as they did. Again, the Court, citing *Granger v. Wisner*, noted that the fact that State
18 Farm’s managers had consulted attorneys was not a privileged communication.
19

20 The Defendant’s claim is particularly ironic. They cite no reason, whatsoever, why
21 Cochise County would seek to protect the fact that the County retained the Jellison Law Offices
22 to defend the County in the Welch lawsuit. To the contrary, the defendant’s own Motion to
23 Dismiss, a public record, establishes that Cochise County did hire the Jellison Law Offices, the
24 date that occurred, the reason for the hiring, and the fact that it was the County Attorney’s Office
25 that consulted with the Jellison Law Offices. (Defendants’ Motion to Dismiss, p. 2) Thus, while
26

1 asserting that the retainer agreement between Cochise County and the Jellison Law Offices was
2 privileged, Cochise County itself chooses to make public virtually all of the information that
3 might be in that retainer agreement. Indeed, the only things likely to be in the retainer agreement
4 that is not contained in the Defendants' Motion to Dismiss are the hourly rate to be paid to the
5 Jellison Law Office and the scope of the work to be performed. The defendants cite no case law
6 contending that the fee arrangement can itself be a confidential communication. As the
7 authorities cited herein establish, it is not a confidential communication, but rather collateral to
8 the attorney-client privilege.
9

10
11 If Defendants thought there is something in the retainer agreement that goes beyond the
12 terms of a normal retainer, they had options. They could have disclosed the normal, non-
13 privileged terms, and sought *in camera* review of any special terms. *KPNX-TV v. Superior Court*,
14 183 Ariz. 589, 594, 905 P.2d 598, 603 (Div. 1, 1995). They could have themselves instituted a
15 declaratory judgement. Agency Handbook, § 6.4. They did neither.
16

17 The retainer agreement Plaintiff Neff seeks involves the expenditure of public funds on
18 a matter of public concern. The sole claim advanced to deny disclosure of the retainer, a claim
19 of attorney-client privilege, is, as set forth above, unsupportable. As our Supreme Court noted
20 in a somewhat different context:

21 Democracy blooms when the public is informed and justice stagnates where secrecy
22 prevails.

23 *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557, 561, 490 P.2d 563, 567 (Sup. 1971).

24 For all of the foregoing reasons, this Court should deny the Defendants' Motion to
25 Dismiss in all respects.
26

1 RESPECTFULLY SUBMITTED this 6th day of September, 2019.

2 MICHAEL J. BLOOM, P.C.

3
4 
5 Michael J. Bloom
6 Attorney for Plaintiff Terri Jo Neff

7 Original of the foregoing Federal Expressed for filing
8 this 6th day of September, 2019, with:

9 Clerk of Court
10 Cochise County Superior Court
11 100 Colonia de Salud, #202
12 Sierra Vista, Arizona 85636

13 Original of the foregoing Federal Expressed for delivery
14 this 6th day of September, 2019, to:

15 Honorable David Thorn, Div. III
16 Cochise County Superior Court
17 100 Colonia de Salud, #202
18 Sierra Vista, Arizona 85636

19 Copy of the foregoing mailed and emailed
20 this 6th day of September, 2019, to:

21 Christine J. Roberts
22 Civil Deputy County Attorney
23 Cochise County Attorney's Office
24 P.O. Drawer CA
25 Bisbee, Arizona 85603
26 CVAttymeo@cochise.az.gov
Attorney for Defendants


27 By: 
28 Maria C. Chavez Romero

EXHIBIT 1

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

November 21, 1969

DEPARTMENT OF LAW OPINION NO. 70-1 (R-33)

REQUESTED BY: THE HONORABLE BURTON S. BARR
House Majority Leader
House of Representatives

- QUESTIONS:
1. What is the public's right in inspecting the records of an institution such as the University of Arizona?
 2. Are there any records that would not be available to the Budget Analyst of the House of Representatives?
 3. Is there any information possessed by the Budget Analyst that can be withheld from the public?
 4. Is there any special format required in obtaining records from an institution that is tax supported with state money?
 5. What constitutes a public record, as outlined in A.R.S. § 39-121?

- ANSWERS:
1. See body of opinion.
 2. No, as qualified.
 3. See body of opinion.
 4. No.
 5. See body of opinion.

In answering your proposed questions relating to what records of institutions of higher learning are subject to examination by the public, no absolute yardstick can be formulated to apply to all records. In certain instances the

Opinion No. 70-1
(R-33)
November 21, 1969
Page Two

Legislature, by statute, has prohibited disclosure of information. See, e.g., A.R.S. § 43-145 dealing with income tax returns. It is necessary to determine in each instance whether the particular record is subject to inspection or disclosure.

The Board of Regents of the Universities and State Colleges of Arizona is the governing body with jurisdiction and control over the state Universities. A.R.S. §§ 15-721 through 15-729, inclusive. A.R.S. § 39-121 provides:

"Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person."

There are a number of judicial decisions that have interpreted the foregoing statutory provision.

The Supreme Court of Arizona in the case of Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952), made the following pertinent comments regarding public records in an action brought against the Governor of Arizona seeking the right to inspect documents relating to an investigation conducted by the Attorney General:

"A public record is defined as follows:

"A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference."

"State ex rel. Romsa v. Grace, 43 Wyo. 454, 5 P.2d 301-303; People ex rel. Stenstrom v. Harnett, 131 Misc. 75, 226 N.Y.S. 338-341; People v. Purcell, 22 Cal.App.2d 126, 70 P.2d 706. Also a record is a 'public record' which is required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done. Robison v. Fishback, 175 Ind. 132,

93 N.E. 666-669, L.R.A. 1917 B, 1179; Amos v. Gunn, 84 Fla. 285, 94 So. 615-634; Steiner v. McMillan, 59 Mont. 30, 195 P. 836-837. It has also been held that a written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by express provisions of law or not, is admissible as a public record. People v. Purcell, supra, and State v. Ewert, 52 S.D. 619, 219 N.W. 817-826.

"It will be observed that section 4-102, supra, [A.R.S. § 41-102] provides that the Governor shall keep a record of his official acts and certain other things. Under the definition above given that a record which the law requires to be made is a public record, the official acts of the Governor and accounting of his official expenses and disbursements including incidental expenses of his department, and a register of appointments made by him, etc., are public records. This section also says that the Governor 'shall keep in his office all documents received by him in his official capacity.' It is said in People ex rel. Simons v. Dowling, 84 Misc. 201, 146 N.Y.S. 919, at page 921, that:

"* * * A record implies an actual transcription by the official. The object is not only to give the instrument perpetuity but publicity.'

"It is also a well-established rule of law that any instrument which the statute requires to be filed in a public office is admissible in evidence as a public record but where the law requires such filing it also usually requires that the material portions thereof as to identity of persons involved, property transferred, purchase price, liens, etc., be transcribed in a record book kept for that purpose.

"We believe the first part of section 4-102, supra, [A.R.S. § 41-102] clearly requires transcription to a permanent record of the expense account, appointments, etc., of the Governor, while the latter part of the section relating to documents does not even require that such documents be filed. It merely provides that they shall be kept in the office without prescribing in what manner they shall be kept.

"It seems to us that the legislature intended to make a distinction between those acts recited in the first part of the section--'The governor shall keep a record * * *'--and those in the second part of the section concerning the 'documents received by him in his official capacity' which are required to be kept in his office. We are of the opinion that the latter were not intended by the legislature to be classified as public records.

* * *

"It is our view that we may reasonably conclude that the documents received by the Governor in his official capacity were not intended to be classified by the legislature as public records, but they may fall within the classification of 'other matters', in section 12-412, supra, [A.R.S. § 39-121] and therefore subject to inspection by an interested citizen unless they are confidential or of such a nature that it would be against the best interests of the state to permit a disclosure of their contents."

In Industrial Commission v. Holohan, 97 Ariz. 122, 397 P.2d 624 (1964), it was held that records of Industrial Commission proceedings, orders and awards are public records. The court did say that:

". . . But information which is not collected to serve as a memorial of an official transaction or for the dissemination of information is private except as to a claimant or parties within the meaning of A.R.S. § 23-961 A, 1 and 2."

Since A.R.S. § 32-121 was adopted from California, California judicial decisions are of assistance in interpreting our statute. In City Council of City of Santa Monica v. Superior Court, 21 Cal.Rptr. 896 (1962), the court said:

"In order that an entry or record of the official acts of a public officer shall be a public record, it is not necessary that such record be expressly required by law to be kept; but it is sufficient if it be necessary or convenient to the discharge of his official duty. 'Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record.' Cyclopedic Law Dictionary, p. 776. [Citation omitted.] On the other hand, the mere fact that a writing is in the custody of a public agency does not make it a public record.

* * *

"There is no precise formula by which it can be determined whether a writing is such 'other matter'; it depends in each instance upon the facts of the particular case. It is obvious that not every piece of correspondence or written statement lodged in the office of a public officer partakes of such a public interest as to be open to general inspection."

In People v. Fussel, 29 Cal.Rptr. 562 (1963), a criminal case, the court indicated that not all records that are not specifically rendered confidential by statute are public. The court said: "There remains a category of records in which the public as a whole has no interest."

See Attorney General's Opinion No. 65-44-L, which contains an excellent analysis of inspection of public records with numerous legal citations and references to prior Attorney General Opinions covering the subject matter.

Answering Question 1, the public has a right to examine public records which are executed by a public officer in pursuance of a duty which has as its immediate purpose or intent the dissemination of information to the public or which would serve as a memorial of official transactions for public reference. Mathews v. Pyle, supra. Information which is not collected to serve as a memorial of an official transaction or for the dissemination of information may be private except as to a claimant or parties to an action, as held in Industrial Commission v. Holohan, supra.

As an example of a record or information which is subject to disclosure as a matter of right to the public is a record of the actual expenditure of public monies. Information as to discussions prior to actual expenditure may not fall within the category definition of "public records" and "other matters" as stated in A.R.S. § 39-121.

As to "other matters" as stated in A.R.S. § 39-121, the Board of Regents has authority to determine in the first instance whether a right of inspection exists as to any particular document not categorized as a public record and subject to a determination by our courts as to whether or not such a document is confidential or is of such a nature that an inspection by the public would be detrimental to the best interest of the state. Mathews v. Pyle, supra.

Answering Question 2, all records that have a relationship to the formulation of legislation or appropriations must be made available to the Joint Legislative Budget Committee and its Budget Analyst. The Joint Legislative Budget Committee has power to investigate, hold hearings and conduct inquiries, which may enable it to obtain all documents bearing upon the proper exercise of its duties. A.R.S. §§ 41-1271, et seq.

Answering Question 3, it is our opinion that documents possessed by the Budget Analyst are subject to the same test and analysis as for other public officers with respect to what matters are considered available for public inspection.

Answering Question 4, there is no statutory format in reference to examining public records and other matters open to inspection. Unless specific legislation provides otherwise, a public officer need not make or furnish copies of records in his office to the public. The right of inspection is merely that, and is confined to times during office hours. There is some authority in other jurisdictions to the effect that the right of inspection cannot be exercised at such times and in such a manner as to cause disruption of public business. Bruce v. Gregory, 56 Cal.Rptr. 265, 423 P.2d 193 (1967); Republican Party of Ark. v. State ex rel. Hall, 400 S.W.2d 660 (1966); Holcombe v. State ex rel. Chandler, 240 Ala. 590, 200 So. 739 (1941); State ex rel. Wogan v. Clements, 194 La. 812, 192 So. 126 (1939), affirmed 195 So. 1 (1940); State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W.2d 28 (1939); State ex rel. Sullivan v. Wilson, 5 OhioSupp. 399 (1937).

Answering Question 5, a public record is, as indicated above, a record made by a public officer in pursuance of a duty with the immediate purpose to disseminate information to the public or to serve as a memorial of official transactions for public reference. Mathews v. Pyle, supra.

Respectfully submitted,



GARY K. NELSON

The Attorney General

EXHIBIT 2

KeyCite Yellow Flag - Negative Treatment
Distinguished by *Stoba v. Saveology.com, LLC*, S.D.Cal., July 7, 2015

2009 WL 3857425

Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. California.

HOOT WINC, LLC, Plaintiff,
v.

RSM McGLADREY FINANCIAL PROCESS
OUTSOURCING, LLC, and Does 1 to 50, inclusive,
Defendants.

No. 08cv1559 BTM (WMc).
|
Nov. 16, 2009.

Attorneys and Law Firms

Anthony J. Durone, Kathleen M. Nemechek, Nicholas L. Divita, Berkowitz Oliver Williams Shaw & Eisenbrandt, Kansas City, MO, M. Cory Brown, Michael R. Gibson, Higgs Fletcher and Mack LLP, San Diego, CA, for Defendants.

AMENDED RULING RE: PLAINTIFF'S PRIVILEGE LOG AND APPLICATION OF PRIVILEGES

WILLIAM McCURINE, JR., United States Magistrate Judge.

A. Procedural History

*1 On September 28, 2009. The Court held a telephonic discovery conference. [Doc. No. 74.] The Court permitted letter briefing regarding a) the adequacy of Plaintiff's privilege log; and b) the applicability of the work product privilege to billing records and reports conducted by CBIZ. *Id.* After conducting and in camera review of documents as well as careful consideration of the briefing and exhibits provided by the parties, the Court orders production of some of the documents identified herein.

B. Plaintiff's Argument

Plaintiff contends Third Party tax consultant CBIZ/Mayer Hoffman McCann has produced all the documents in its possession regarding its engagement by Hoot Winc with the exception of 16 documents produced for *in camera* review, which Plaintiff contends are protected by the attorney-client or attorney-work product privileges. Plaintiff asserts Defendant seeks to take unfair advantage of the work performed by CBIZ in anticipation of litigation. Plaintiff also argues the sufficiency of its privilege log, asserting that all information available to it was disclosed in the privilege log, thereby establishing its sufficiency as a matter of law.

C. Defendant's Argument

Defendant contends no claim of privilege attaches to the documents in CBIZ's possession and instead assert CBIZ's billing records and reports are directly relevant to Hoot Winc's damages claim based upon fees paid to CBIZ to remedy alleged accounting/book-keeping mistakes made by Defendant and therefore, must be produced. Defendant further argues any privilege which may have attached to the financial reports and billing records at issue are waived by virtue of Plaintiff's materially deficient and inadequate privilege log.

I. INTRODUCTION

II. DISCUSSION

A. Attorney-Client Privilege Does Not Apply

The attorney-client privilege “protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice.” *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 128 (2007); *See also Genentech, Inc. v. U.S. Intern. Trade Com’n*, 122 F.3d 1409, 1415 (1997); *Am. Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 745 (1987). In order for the privilege to attach, the elements of the attorney-client privilege must be met. The elements are: (1) The asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers; c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) Not waived by the client. *See* 8 Wright & Miller, Fed. Prac & Proc., Civ.2d § 2017, p. 2 (quoting *U.S. v. United States Shoe Machinery Co.*, 89 F.Supp. 357, 358, D.C. Mass. (1950)) Because the privilege withholds relevant information from the fact-finder, the attorney-client privilege “protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.” *Fisher v. United States*, 840 F.2d 1424, 1428 (1988) (citing *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir.1977)).

*2 Plaintiffs claim that attorney client privilege protects all their submitted documents from disclosure. In particular, Plaintiff contends the retainer agreement between accountants Mayer Hoffman McCann PC (“Mayer”) and Eagen O’Malley & Avenatti, LLP is protected under the attorney-client privilege.¹

However, the Ninth Circuit has repeatedly held retainer agreements are not protected by the attorney-client privilege or work product doctrine. *Ralls v. United States*, 52 F.3d 223, 225 (1995); *See also United States v. Blackman*, 72 F.3d 1418, 1424 (9th Cir.1995); *In re Michaelson*, 882 F.2d 882 (9th Cir.1975.) Because the attorney-client privilege has not been applied to retainer agreements, Plaintiff’s document 1 is not protected by that privilege.

The attorney-client privilege is also inapplicable to documents 2 through 16. Mayer Hoffman McCann PC has been retained by Eagen O’Malley & Associates, LLP to aid in Plaintiff’s case. All the notes, reports and data compiled by Mayer have been taken from documents and

correspondence between Plaintiff and Defendant. The underlying communications have already been disclosed to both parties, and the attorney-client privilege does not apply. However, because several documents were created by Mayer in anticipation of litigation and help form Plaintiff’s litigation strategy, the work product privilege is applicable to some as explained in detail below.

B. Parameters and Application of the Work Product Doctrine

Some of the subject documents involve invocation of the attorney work product doctrine and is not a matter of substantive privilege; therefore, we look to federal law, not state law, to resolve the issue. The Court must apply Federal Rule of Civil Procedure 26(b) (3) and Federal Rule Of Evidence 612(2). *Connolly vs Victor Technologies* 114 F.R.D. 89,95 (S.D.California, 1987). The work product doctrine, codified in Federal Rule of Civil Procedure 26(b) (3), protects “from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation.” *In re Grand Jury Subpoena*, 357 F.3d 900 (2004) citing *Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1494 (1989). Protected documents may only be ordered produced upon an adverse party’s demonstration of “substantial need for the materials” and “undue hardship [in obtaining] the substantial equivalent of the materials by other means.” Fed.R.Civ.P. 26(b)(3).

In order to qualify for protection under Rule 26(b)(3) the documents must have two characteristics: (1) they must be ‘prepared in anticipation of litigation or for trial,’ and (2) they must be prepared ‘by or for another party or by or for that other party’s representative.’ “ *In re California Pub. Utils. Comm’n*, 892 F.2d 778, 780-81 (1989) (quoting *Fed.R.Civ.P.* 26(b)(3)). In determining whether litigation is “anticipated” for purposes of protection under the work product doctrine, the Ninth Circuit has applied the “because of” standard. The “because of” standard does not consider whether litigation was a primary or secondary motive behind the creation of the document. Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the “document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation.” *In re Grand Jury Subpoena*, 357 F.3d 900, 908 (2004), (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2nd Cir.1988)).

*3 It appears from examination documents 2 through 4 and 6 through 13 were created in “anticipation of

litigation” and are protected from disclosure by the work product doctrine. Documents 1, 14, 15 and 16 are not covered by either the attorney-client privilege or attorney work product privilege and are discoverable.

Document Number	Description	Protection
1	Retainer Agreement between Mayer and EMA dated 6/27/08	Not Protected -Retainer Agreements are not protected under either the attorney-client privilege or work product doctrines. <i>United States v. Blackman</i> , (1995) 72 F.3d 1418, 1424.
2	Report outline	Work product privilege applies -Document outlines Plaintiff’s allegations and supporting evidence.
3	Plaintiff’s Report dated 6/17/06. Date appears to be a typographical error (references within document to emails dated after 6/17/06)	Work product privilege applies -Identifies and summarizes email correspondence according to issue.
4	Report regarding relationship between Plaintiff and Defendant and Defendant misconduct	Work Product Privilege applies -Details overview, discussion, findings and evidence in support of litigation.
5	Mayer billing records	Not Protected under attorney-client privilege-factual communication between attorney and client; no legal advice sought.

Work product privilege is also inapplicable. The billing statements not made in support of litigation or trial.

6	Bank reconciliations for different store locations (2/06-11/06)	Work product privilege applies -Breaks down the amount of unreconciled transactions for each store per month.
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7	Recorded transactions/observations regarding Plaintiff's Anaheim store	Work product privilege applies -Looks at approximately six isolated transactions and records observations.
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8	Summary of email correspondence	Work product privilege applies oOrganizes emails according to legal issue.
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9	Brief outline of legal issues.	Work product privilege applies oBriefly outlines arguments involving Defendant, progression of events.
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10	Notes regarding account reconciliations	Work product privilege applies o Details allegations, outline of service agreement between Plaintiff and Defendant.
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11	Notes regarding accounts payable	Work product privilege applies -Details issues, allegations, outline of
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service agreement
between Plaintiff and
Defendant.

12

Report regarding data
upload errors

**Work product privilege
applies**-The report
outlines the issues and
outlines the relevant
email communications
and documentary
evidence, Plaintiff's logs
and relevant emails.

13

Notes on emails
concerning loan
transactions.

**Work product privilege
applies** o Outline of
correspondence
regarding loans/invoices.

14

Search record of
Plaintiff's electronic files
(Most lack subject
heading, when sent)

Not protected o
Attorney client privilege
does not apply. This is
simply a list of electronic
file folders. Work product
privilege does not
apply underlying
information has not been
modified in any way and
does not reveal Plaintiff's
litigation strategy.

15

Search record of
Plaintiff's electronic files
(same as above)

Not protected o
Attorney client privilege
does not apply. This is
simply a list of electronic
file folders. Work product
privilege does not
apply underlying
information has not been
modified in any way and
does not reveal Plaintiff's
litigation strategy.

16

Search record of
Plaintiff's electronic files
(same as above)

Not protected o
Attorney client privilege
does not apply. This is
simply a list of electronic
file folders. Work product
privilege does not
apply underlying
information has not been
modified in any way and
does not reveal Plaintiff's
litigation strategy.

C. Parameters of an Adequate Privilege Log

*4 “When a party withholds information ... by claiming that it is privileged ... the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 126 (2007), (quoting *RCFC* 26(b)(5).)

Although Rule 26(b)(5) fails to contain an explicit prohibition against boilerplate assertions of privilege, it requires a proper assertion of privilege be more specific than generalized. The advisory committee notes accompanying Rule 26(b)(5) note that the nature of the notice required is explicitly left indeterminate: “The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection.” The notes also provide that there may be certain situations in which details would not be appropriate or unduly burdensome. Still, the “party must ... provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection.” In interpreting Rule 26(b)(5) however, the Ninth Circuit has determined boilerplate assertions in a privilege log are insufficient to invoke an evidentiary privilege. In *Burlington Northern & Santa Fe Station v. United States District Court for the District of Montana*, 408 F.3d 1142, 1149 (2005), the Court held

boilerplate objections or blanket refusals inserted into a response to a request for production of documents are insufficient to assert a privilege. Despite both the inadequacies and untimeliness of the privilege log, the *Burlington* court found a *per se* waiver was inappropriate.

While an inadequate privilege log may be the basis for disallowing a privilege, such a finding resembles a sanction and should be weighed in terms of the intent of the party producing the defective log and against the harm caused by the disclosure of what otherwise might be privileged documents. See *Evergreen*, at 126. In *Burlington*, the Ninth Circuit rejected a *per se* rule of disclosure for an inadequate privilege log in favor of obtaining additional information from the plaintiff. See *Burlington*, *supra* at 1149.

Here, Plaintiff's privilege log is inadequate. Plaintiff fails to explain why both the attorney client and work product privileges are applicable to each document submitted for review. More importantly, because work product privilege is claimed for every document, the plaintiff needed to show each document was created in anticipation of litigation. The log does not designate the authors of the documents, the recipients of the documents, or when the documents were created.² Plaintiff acknowledges this deficiency and claims the information is not available. Plaintiff's complaint was filed on August 22, 2008. Plaintiff's current attorney Eagan O'Malley & Avenatti, LLP retained Mayer on June 27, 2008 to consult regarding Plaintiff's alleged damages relating to the litigation. Therefore, some of the documents submitted for *in camera* review would necessarily have been created in anticipation of litigation. However, Mayer was initially

hired by Plaintiff's previous attorney Justin Johl from Shook, Hardy & Bacon.³ Plaintiff's have not provided any documentation as to when Mr. Johl was retained or when Mr. Johl retained Mayer. When examining the contents and organization of documents 2 through 4 and 6 through 13, it seems apparent that they were prepared in 'anticipation of litigation' because the created documents have rearranged all their available evidence according to legal issue. In addition, several of the documents clearly relate to Plaintiff's litigation strategy. Because Plaintiff claims the dates and authors of the submitted documents are unavailable, Plaintiff submit appropriate affidavit(s), presumably from Alexander L. Conti of Eagan O'Malley & Avenatti and Plaintiff's initial lawyer Justin Johl of Shook, Hardy & Bacon attesting that Mayer was retained to consult and prepare documents for such a purpose. An affidavit from the Mayer representative in charge of the project is also necessary.

*5 Furthermore, The court has ordered Plaintiff to produce documents 1, 5 and 14 through 16 identified on its privilege log. It is the Court's ruling the work product privilege does not apply to these documents.

However, if Plaintiff's experts cannot rely upon, consider or otherwise use any of the privileged documents, the privilege will be waived.⁴ *See Federal Rule of Evidence 705*. If Plaintiff's experts rely upon, consider or use any of the protected documents, Plaintiff must produce those documents to Defendant immediately upon determining

Plaintiff has chosen to have one or more of its experts rely upon, consider or usesuch document(s). Plaintiff must make the determination whether its experts will rely upon, consider or use the protected documents no later than **December 1, 2009**. Furthermore, Plaintiff must allow Defendant at least two weeks after delivery of the documents to Defendant to allow Defendant adequate time to prepare to take the depositions.

III. CONCLUSION AND ORDER THEREON

In accordance with the Court's findings expressed above, Defendants must receive documents 1, 5 and 14 through and including 16 **pursuant to the protective order** in place in the above-entitled matter on or before **November 23, 2009**.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3857425

Footnotes

- 1 Retainer Agreement is labeled as Plaintiff's Document No. 1
- 2 Documents 1 and 3 are the only dated documents.
- 3 Plaintiff's Ltr Brief dated 10/9/09 (Page 3)
- 4 This ruling, of course, applies to any and all documents the Court has deemed privileged that Plaintiff's expert(s) rely on, use or consider.

EXHIBIT 3

249 F.R.D. 643
United States District Court, D. Idaho.

Lino PAUL, Plaintiff,
v.

WINCO HOLDINGS, INC. (dba Winco Foods, Inc.); Bill Long; Roger Cochell; Kathy Schorzman; Peggy Drescher; Mary Garcia; Sandee Waddcup; Janelle Woessner; Charlie Wilson; Lorraine Beeson; and various John and Jane Does (either officers, agents or representatives of a Winco Store Employee Association, or of an Employee Association Representative Committee, or both); and The Winco Store Employee Associations, Defendants.

No. CV 02-381-S-EJL-MHW.

Feb. 27, 2008.

Synopsis

Background: Former grocery store employee, a Sudanese black male who was terminated for selling beer to customer a few minutes before state-mandated time for start of alcohol sales, filed complaint alleging that employee association breached fiduciary duties in violation of Labor Management Reporting and Disclosure Act (LMRDA) and state common law, that employer knowingly assisted in that breach, that they violated Labor Management Relations Act (LMRA) restrictions on financial transactions, giving rise to several causes of action under Racketeer Influenced and Corrupt Organizations Act (RICO), and that they violated his civil rights under § 1981 and § 1985. Defendants moved for protective order relating to depositions, and employee moved for protective order on his responses to defendants' written discovery until completion of their noticed depositions. Defendants also moved to strike employee's expert witness disclosure.

Holdings: The District Court, Mikel H. Williams, Chief United States Magistrate Judge, held that:

^[1] scope of employee's discovery regarding RICO claims would be limited;

^[2] employer's treatment of similarly situated employees might be relevant to § 1981 claim and employee was entitled to discovery in that regard;

^[3] discovery concerning LMRDA and common law fiduciary duty claims would be limited;

^[4] employee's discovery concerning employee association defendants' alleged violations of Title I of LMRDA would extend from time his membership in association started until he first brought action;

^[5] employee could depose employer's former vice president of labor and human resources;

^[6] employee could not depose former chief executive officer (CEO);

^[7] employee was not entitled to protective order on his answers and responses; and

^[8] employee's counsel could not appear as expert witness.

Motions granted in part and denied in part.

West Headnotes (21)

^[1] **Federal Civil Procedure**
Protective orders

Movant for protective order must show that its issuance is necessary, which requires a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements. Fed.Rules Civ.Proc.Rule 26(c)(1), 28 U.S.C.A.

Cases that cite this headnote

^[2] **Racketeer Influenced and Corrupt Organizations**
Labor law violations

Violations of LMRA provision dealing with restrictions on payments and loans to labor organizations are expressly included in Racketeer Influenced and Corrupt Organizations Act (RICO) definition of "racketeering activity."

18 U.S.C.A. § 1961(1)(C); Labor–Management Relations Act, 1947, § 302, 29 U.S.C.A. § 186.

Cases that cite this headnote

- [3] **Racketeer Influenced and Corrupt Organizations**
☞ Business, property, or proprietary injury; personal injuries
Racketeer Influenced and Corrupt Organizations
☞ Causal relationship; direct or indirect injury

Standing to bring Racketeer Influenced and Corrupt Organizations Act (RICO) civil action requires that claimant allege that it suffered an injury to its business or property, as a proximate result of the alleged racketeering activity. 18 U.S.C.A. § 1964(c).

Cases that cite this headnote

- [4] **Racketeer Influenced and Corrupt Organizations**
☞ Causal relationship; direct or indirect injury

Central question court must ask when evaluating Racketeer Influenced and Corrupt Organizations Act (RICO) claim is whether alleged violation led directly to plaintiff's injuries. 18 U.S.C.A. § 1962.

Cases that cite this headnote

- [5] **Federal Civil Procedure**
☞ Scope

Scope of former grocery store employee's discovery regarding alleged illegal payments to union, supportive of his Racketeer Influenced and Corrupt Organizations Act (RICO) claims against employer, would be limited to alleged violations from date store opened to date employee stopped pursuing his grievance

internally, and limited to store he where he worked, unless employee established any merit to his assertions of RICO violations during the time frame and could show that RICO predicate acts could be prevalent chain-wide. 18 U.S.C.A. § 1962; Labor Management Relations Act, 1947, § 302, 29 U.S.C.A. § 186.

Cases that cite this headnote

- [6] **Racketeer Influenced and Corrupt Organizations**
☞ Number of predicate acts
Racketeer Influenced and Corrupt Organizations
☞ Continuity or relatedness; ongoing activity

To constitute a “pattern of racketeering activity,” as that phrase is used in Racketeer Influenced and Corrupt Organizations Act (RICO), there must be at least two acts of racketeering activity within ten years of one another; also, claimant must prove that (1) the racketeering predicates are related and (2) they amount to, or pose a threat of, continued criminal activity. 18 U.S.C.A. § 1961(5).

Cases that cite this headnote

- [7] **Racketeer Influenced and Corrupt Organizations**
☞ Causal relationship; direct or indirect injury

In the Ninth Circuit, factors relevant to whether plaintiff can show “proximate cause” as required for standing to bring civil claim under Racketeer Influenced and Corrupt Organizations Act (RICO) are (1) whether there are more direct victims of alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general, which defeats proximate cause, (2) whether it will be difficult to ascertain amount of plaintiff's damages attributable to defendant's wrongful conduct, and (3) whether courts will have to adopt complicated rules apportioning damages to obviate risk of multiple

recoveries. 18 U.S.C.A. § 1964(c).

Cases that cite this headnote

^[18] **Civil Rights**

☞ Disparate treatment

Employment discrimination claims brought under § 1981 follow the same legal principles as those applicable in Title VII disparate treatment cases; to prove employment discrimination under either, claimant must show that (1) he is a member of a protected class, (2) he was qualified for his position, (3) he experienced an adverse employment action, and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding adverse employment action give rise to inference of discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

^[19] **Federal Civil Procedure**

☞ Employment, records of

Black male grocery store employee who was terminated after he sold beer to customer a few minutes before mandated time for start of alcohol sales and alleged that white female employee was not disciplined for her involvement in sale of alcohol was entitled to discovery concerning employer's treatment of similarly situated employees from date store opened until date action was filed; that discovery might be relevant to employee's § 1981 claim. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.; 42 U.S.C.A. § 1981.

1 Cases that cite this headnote

Persons who have fulfilled requirements of union membership are "members" under LMRDA even if labor organization does not recognize their membership. Labor-Management Reporting and Disclosure Act of 1959, § 3(o), 29 U.S.C.A. § 402(o).

Cases that cite this headnote

^[11] **Labor and Employment**

☞ Withdrawal or resignation of members

Labor and Employment

☞ Expulsion, Suspension or Other Discipline of Members

"Membership," as defined by LMRDA, continues until (1) member voluntarily withdraws from union, or (2) union expels or suspends member after appropriate proceedings held pursuant to lawful constitutional or bylaw provisions. Labor-Management Reporting and Disclosure Act of 1959, § 3(o), 29 U.S.C.A. § 402(o).

Cases that cite this headnote

^[12] **Labor and Employment**

☞ Judicial review or intervention

Under the appropriate circumstances, union member can file suit for appropriate relief with respect to violation of LMRDA section governing fiduciary responsibilities of officers of labor organizations; however, such claims are similar to shareholder derivative actions because relief obtained benefits union as whole rather than individual bringing claim. Labor-Management Reporting and Disclosure Act of 1959, § 501, 29 U.S.C.A. § 501.

Cases that cite this headnote

^[10] **Labor and Employment**

☞ Membership

^[13] **Federal Civil Procedure**

⚙️ Scope

Terminated grocery store employee would be allowed to conduct discovery concerning LMRDA and common law fiduciary duty claims starting on date store opened, even though employee association was not created until more than a year and a half later, and continuing until present since employee was still association member in good standing; this would allow employee to explore preliminary negotiations that resulted in creation of employee association. Labor-Management Reporting and Disclosure Act of 1959, § 501, 29 U.S.C.A. § 501.

Cases that cite this headnote

^[14] **Federal Civil Procedure**
⚙️ Scope

Employee's discovery concerning employee association defendants' alleged violations of Title I of LMRDA would extend from time his membership in association started until he first brought action. Labor-Management Reporting and Disclosure Act of 1959, §§ 101, 105, 29 U.S.C.A. §§ 411, 415.

Cases that cite this headnote

^[15] **Privileged Communications and Confidentiality**
⚙️ Client information; retainer and authority

Communications between attorney and client that concern identity of client, amount of fee, identification of payment by case file name, and general purpose of work performed are usually not protected from disclosure by attorney-client privilege.

6 Cases that cite this headnote

Confidentiality

⚙️ Client information; retainer and authority

Correspondence, bills, ledgers, statements, and time records which also reveal motive of client in seeking representation, litigation strategy, or specific nature of services provided, such as researching particular areas of law, fall within attorney-client privilege.

4 Cases that cite this headnote

^[17] **Federal Civil Procedure**
⚙️ Notice of Examination or Motion for Leave to Examine

Although reasonable notice of depositions must be given, court must determine what is reasonable based on circumstances of particular case and should consider time between notice and deposition, with eye towards preparation and travel; however, opposing party has no basis to complain where it has concealed identities of witnesses until late in the game. Fed.Rules Civ.Proc.Rule 30(b)(1), 28 U.S.C.A.

7 Cases that cite this headnote

^[18] **Federal Civil Procedure**
⚙️ Service

Employee could depose employer's former Vice President of Labor and Human Resources despite employer's objection that employee's service of notice of deposition eight business days prior to discovery cutoff in discrimination case was too late; aside from employee's subjective belief that former executive would be named as employer's deponent, court would allow deposition because of deponent's former position and fact he signed employee agreement as employer's representative. Fed.Rules Civ.Proc. Rule 30(b)(1, 6), 28 U.S.C.A.

Cases that cite this headnote

^[16] **Privileged Communications and Confidentiality**

not be acting as employee's expert witness.

[19] **Federal Civil Procedure**
☞Service

Employee could not depose employer's former President and Chief Executive Officer (CEO), where employee did not serve notice concerning that deposition until eight days before discovery cutoff in his discrimination case; employee did not expect that former executive would act as employer's deponent or that he would have sufficient knowledge of relevant issues in case to require his deposition. Fed.Rules Civ.Proc. Rule 30(b)(6), 28 U.S.C.A.

Cases that cite this headnote

Cases that cite this headnote

Attorneys and Law Firms

*646 Michael B. Schwarzkopf, Boise, ID, for Plaintiff.

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[20] **Federal Civil Procedure**
☞Protective orders

Plaintiff was not entitled to protective order on his answers and responses to defendants' written discovery until completion of their outstanding depositions, despite his contention that it would be unfair to require his response before defendants' noticed depositions had been completed because they had not appeared for any of their noticed depositions and had unreasonably moved to protect portions of them. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

Cases that cite this headnote

MEMORANDUM DECISION AND ORDER

MIKEL H. WILLIAMS, United States Chief Magistrate Judge.

On December 10, 2007, WinCo Foods, Inc. (now known as WinCo Holdings, Inc.) ("WinCo"), Bill Long, Roger Cochell, Kathy Schorzman, and Lorraine Beeson (collectively, "WinCo Defendants") filed a motion for protective order relating to the depositions of WinCo Defendants' noticed by Plaintiff Lino Paul ("Plaintiff"). WinCo Defs.' Mot. Protective Order, Docket No. 181. WinCo Defendants generally allege that Plaintiff's notice of deposition was filed too late, and that the discovery requests are overly broad and unduly burdensome.

[21] **Evidence**
☞Disqualification; bias or conflict of interest
Witnesses
☞Attorney and client

Employee's trial counsel could not appear as expert witness in employee's discrimination case; while court had previously held he could not act as both expert witness and trial counsel it had granted employee ten days to propose another attorney to act as trial counsel, but employee had neither proposed another attorney nor notified court that existing counsel would

Defendants Peggy Drescher, Mary Garcia, Sandee Waddoups, Janelle Woessner, Charlie Wilson and WinCo Store No. 1 Employee Association (collectively, "Employee Association Defendants") adopted and joined WinCo Defendants' motion for protective order on the same day. Employee Defs.' Joinder Mot. Protective Order, Docket No. 182. Also, Employee Association Defendants filed their own motion for protective order arguing that Plaintiff's discovery requests directed to them raised the same issues as asserted by the WinCo Defendants. Employee Defs.' Mot. Protective Order, Docket No. 183.

In response, Plaintiff moved for a protective order on his responses to WinCo Defendants' and Employee Association Defendants' (collectively, "Defendants") written discovery until the completion of their noticed depositions. Pl.'s Mot. Protective Order, Docket No. 187.

In a separate issue, WinCo Defendants filed a motion to strike Plaintiff's expert witness disclosure on November 8, 2007. WinCo Defs.' Mot. Strike Pl.'s Expert, Docket No. 173. Their motion was in response to Plaintiff's disclosure of his counsel, Michael B. Schwarzkopf, as his expert witness. WinCo Defs.' Supplement to Mot. Strike Pl.'s Expert, Docket No. 177. WinCo Defendants argue that Plaintiff's counsel cannot appear both as advocate and as an expert in this case. WinCo Defs.' Mot. Strike Pl.'s Expert, at 4–5, Docket No. 173. Employee Association Defendants have adopted and joined WinCo Defendants' motion to strike. Employee Defs.' Joinder Mot. Strike Pl.'s Expert, Docket No. 174.

I.

Background.

A. Discovery issues.

Plaintiff, who identifies himself as a Sudanese black male, was employed by WinCo from April 30, 1999 until he was terminated *647 on December 27, 2001. WinCo Defs.' Mem. Supp. Mot. Protective Order, at 2, Docket No. 181–2. His employment with WinCo was limited to WinCo Store No. 1, which opened on October 5, 1998. *Id.* at 11, 15. Plaintiff was terminated shortly after he sold beer to a customer on December 27, 2001. The sale occurred a few minutes prior to 6:00 a.m., the time mandated by the State of Idaho for the start of alcohol sales. In response to his termination, Plaintiff pursued an internal grievance with WinCo Store No. 1 Employee Association until January 18, 2002. *Id.* at 15. Achieving no results from his grievance process, Plaintiff filed the present action on August 15, 2002.

The Hourly Employee Working Conditions & Wages Agreement ("Employee Agreement")¹ controlled Plaintiff's internal grievance regarding his termination. WinCo Defs.' Mem. Supp. Mot. Dismiss, at 47–50, Docket No. 47, Ex. A. It was ratified by WinCo and the

Employee Association on April 20, 2000 with an expiration date of February 7, 2004. *Id.* at 54.

Plaintiff's Second Amended Complaint, filed on July 17, 2007, generally alleges the following: Employee Association Defendants breached their fiduciary duties to Plaintiff, or otherwise caused him harm, by violating 29 U.S.C. §§ 411, 415, and 501 of the Labor–Management Reporting and Disclosures Act ("LMRDA"), 29 U.S.C. § 401, *et seq.*; Employee Association Defendants breached their state common law fiduciary duty to Plaintiff; WinCo Defendants knowingly assisted Employee Association Defendants in the breach of fiduciary duties to Plaintiff; Defendants violated 29 U.S.C. § 186 giving rise to several causes of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962 *et seq.*; and Defendants violated Plaintiff's civil rights under 42 U.S.C. §§ 1981 and 1985.² See Second Am. Compl., Docket No. 165–2.

WinCo Defendants move the Court to limit the scope of Plaintiff's discovery based on the following standing arguments: (1) Plaintiff may only assert claims on his own behalf because the Court denied his motion to certify class action;³ (2) Plaintiff lacks Article III constitutional standing to assert claims on behalf of other store employees; (3) Plaintiff lacks standing to assert a LMRDA claim, under 29 U.S.C. § 501, on behalf of any employee association other than the Employee Association at Store No. 1, and then only for the period for which he was an employee of WinCo Store No. 1; (4) Plaintiff has standing to assert a RICO claim, under 18 U.S.C. § 1962, only where he can show that he has been injured in his business or property by Defendants' conduct constituting a violation, which would be limited to acts taking place at WinCo Store No. 1 during the period that it employed Plaintiff; (5) Plaintiff only has standing to assert a claim for Defendants' breach of fiduciary duty individually; and (6) Plaintiff only has standing to assert a civil rights claim, under 42 U.S.C. §§ 1981 and 1985, in his individual capacity. WinCo Defs.' Mem. Supp. Mot. Protective Order, at 11–14, Docket No. 181–2.

WinCo Defendants also request that Plaintiff not be allowed to take the deposition of Bill Long, or Roger Cochell. WinCo Defs.' Mem. Supp. Mot. Protective Order, at 27, Docket No. 181–2. Mr. Long is WinCo's former President and Chief Executive Officer and currently retains the title of Chairman. *Id.*, n. 11. Mr. Cochell is WinCo's former Vice President of Labor and Human Resources having retired in 2006. *Id.* His signature also appears on the Employee Agreement as WinCo's representative. WinCo Defs.' Mem. Supp. Mot.

Dismiss, at 54, Docket No. 47, Ex. A. WinCo Defendants argue that Plaintiff served notice on Messrs. Long and Cochell too late in the discovery process to allow their depositions. *Id.* at 27.

*648 Employee Association Defendants have joined WinCo Defendants' motion for protective order. *See* Employee Defs.' Joinder Mot. Protective Order, Docket No. 182. They also move for their own protective order and assert that Plaintiff's discovery concerning his LMRDA claims, under 29 U.S.C. §§ 411 and 415, should be limited to the time frame that he was a member of the Employee Association. Employee Defs.' Mem. Supp. Mot. Protective Order, at 9–10, Docket No. 183–4. They argue Plaintiff's membership began when he started working at WinCo Store No. 1, and ended on January 18, 2002 when he ceased pursuing his internal grievance with the Employee Association. *Id.*

Plaintiff moves the Court for a protective order because he claims that Defendants have not appeared for scheduled depositions in bad faith. Pl.'s Mot. Protective Order, at 2, Docket No. 187. Further, he argues that he will be prejudiced if required to respond to Defendants' written discovery requests before the Court rules on Defendants' motions for protective order. *Id.*

B. Plaintiff's counsel as his expert witness.

On October 14, 2007, Plaintiff disclosed his counsel, Michael B. Schwarzkopf, as his expert witness. WinCo Defs.' Supplement to Mot. Strike Pl.'s Expert, Docket No. 177. WinCo Defendants filed a motion to strike Plaintiff's expert witness disclosure on November 8, 2007. WinCo Defs.' Mot. Strike Pl.'s Expert, Docket No. 173. The primary assertion is that Plaintiff's counsel cannot appear both as advocate and as an expert witness in this case. WinCo Defs.' Mot. Strike Pl.'s Expert, at 4–5, Docket No. 173. Employee Association Defendants joined WinCo Defendants' motion to strike on the same day. Employee Defs.' Joinder Mot. Strike Pl.'s Expert, Docket No. 174.

Because of Plaintiff's allegedly improper disclosure, Defendants seek an extension of time to disclose their own experts. Employee Defs.' Mot. Extend Time, Docket No. 175. They have requested that disclosure of their experts be extended for 30 days after the Court rules on its motion to strike. *Id.* at 2.

II.

Discovery Issues.

Defendants' motions for protective orders raise various general and specific issues concerning Plaintiff's proposed discovery. *See generally* WinCo Defs.' Mem. Supp. Mot. Protective Order, Docket No. 181–2; Employee Defs.' Mem. Supp. Mot. Protective Order, Docket No. 183–4. After reviewing the parties' memorandums and oral arguments, the Court has determined that the following guidance sufficiently address the parties' contentions.

A. Geographic and temporal scope of Plaintiff's discovery.

¹¹ Unless limited by court order, “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of either party.” Fed. R. Civ. P. 26(b)(1). In response to a party's motion for a protective order, “[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, ... [and] forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.” Fed. R. Civ. P. 26(c)(1) (alteration in original). The movant must show, however, that the issuance of the protective order is necessary, which requires a “particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *In re: Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir.1998) (quoting *United States v. Garrett*, 571 F.2d 1323, 1326 n. 3 (5th Cir.1978)); *see also* *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 629 (C.D.Cal.2005) (party seeking protection bears burden of showing specific prejudice or harm will result if no protective order is granted).

Defendants argue that Plaintiff's discovery is only relevant if limited geographically to matters concerning WinCo Store No. 1, the Employee Association, and the collective bargaining agreements negotiated between WinCo and the Employee Association. *See* WinCo Defs.' Mem. Supp. Mot. Protective Order, at 15, Docket No. 181–2. They contend that Plaintiff's standing to bring claims against *649 them is limited to WinCo Store No. 1 because he only worked at that store, and was only a member of the Employee Association at that store. *Id.* at

14. Although they allege that Plaintiff's discovery is only relevant to his period of employment, Defendants have offered to extend the time frame of Plaintiff's discovery to run from the date WinCo Store No. 1 opened, October 5, 1998, to the date that Plaintiff stopped pursuing his grievance internally, January 18, 2002. *Id.* at 15. Plaintiff's general claims are addressed separately because the scope of relevant discovery varies depending on which claim is involved

(1) *Plaintiff's RICO claims.*

RICO violations under 18 U.S.C. § 1962 apply to any person:

who uses or invests income derived from a *pattern of racketeering activity* to acquire an interest in or to operate an enterprise engaged in interstate commerce, § 1962(a); who acquires or maintains an interest in or control of such an enterprise through a *pattern of racketeering activity*, § 1962(b); who being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs through a *pattern of racketeering activity*, § 1962(c); or, finally, who conspires to violate the first three subsections of § 1962, § 1962(d).

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 232–33, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (internal quotations omitted) (emphasis added).

¹²¹ Plaintiff's RICO claims against Defendants are based on their alleged violations of 29 U.S.C. § 186. Second Am. Compl., at 21–43, Docket No. 165–2. Violations of § 186 are expressly included in the RICO definition of "racketeering activity." See 18 U.S.C. § 1961(1)(C). Civil remedies under RICO, however, are only available to claimants who have been injured in their business or property by reason of another parties' 18 U.S.C. § 1962 violation. 18 U.S.C. § 1964(c). Even assuming that Plaintiff sustained injury to his business or property, the Court must still address whether his proposed discovery is relevant to his injury by reason of Defendants' alleged §

186 violations.

¹³¹ Standing to bring a RICO civil action requires that the claimant "allege that it suffered an injury to its business or property, ... as a *proximate result* of the alleged racketeering activity." *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1054–55 (9th Cir.2008) (internal citations omitted) (emphasis added); see also *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451, 126 S.Ct. 1991, 1994, 164 L.Ed.2d 720 (2006) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) (holding that a private right of action under RICO requires that the alleged violation was the *proximate cause* of the plaintiff's injury)).

¹⁴¹ ¹⁵¹ The central question a court must ask when evaluating a RICO claim is "whether the alleged violation led directly to the plaintiff's injuries." *Anza*, 126 S.Ct. at 1998. Plaintiff's involvement with Employee Association Defendants derives from his membership in the Employee Association. Because Employee Association Defendants negotiated with WinCo concerning the Employee Agreement at WinCo Store No. 1, Plaintiff's discovery regarding their alleged § 186 violations could be relevant, or likely to lead to relevant evidence, from October 5, 1998, when WinCo Store No. 1 opened. As noted earlier, the Employee Association was first ratified on April 20, 2000. See *supra* n. 1. So, allowing discovery to go back another 18 months would allow Plaintiff to conduct discovery on his theory that it was illegally formed and dominated by WinCo Defendants.

Plaintiff's RICO discovery directed to the Employee Association Defendants is limited to matters concerning Defendants' alleged § 186 violations relating to WinCo Store No. 1. Plaintiff ceased his intra-union grievance process with the Employee Association after it issued a decision concerning his termination grievance on January 18, 2002. See Second Am. Compl., at 7–9, Docket No. 165–2. As Plaintiff was no longer pursuing his remedies through the Employee Agreement, the Court finds that any § 186 violations by Defendants after this date could not have led directly to his alleged injuries. Thus, Plaintiff's discovery concerning the Employee Association Defendants' alleged § 186 violations *650 is only relevant to events occurring prior to January 18, 2002.

¹⁶¹ Plaintiff, however, contends that his discovery to WinCo Defendants seeks to establish that their conduct has constituted a pattern of § 186 violations on a chain-wide basis. See Pl.'s Resp. to WinCo Defs.' Mot., at 9–11, Docket No. 195. Plaintiff argues that in order to establish a pattern of racketeering activity he needs to

examine WinCo's conduct on a chain-wide basis. See 18 U.S.C. § 1962; *H.J. Inc.*, 492 U.S. at 232–33, 109 S.Ct. 2893. To constitute a pattern, there must be at least two acts of racketeering activity within ten years of one another. *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir.2004) (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237–38, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)). Also, the claimant must prove: (1) that the racketeering predicates are related; and (2) that they amount to, or pose a threat of, continued criminal activity. *Id.* Thus, evidence that WinCo Defendants violated § 186 at other WinCo stores prior to January 18, 2002 may be relevant establishing that they engaged in a pattern of racketeering activity. Because this discovery may be relevant, the Court will examine in more detail whether Plaintiff could have sustained injury by reason of WinCo's alleged § 186 violations at other WinCo stores.

¹⁷¹ In the Ninth Circuit, the following factors are relevant to whether a plaintiff can show proximate cause:

- (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Newcal, 513 F.3d 1038, 1054–55 (9th Cir.2008) (quoting *Ass'n of Wash. Pub. Hosp. Dist. v. Philip Morris Inc.*, 241 F.3d 696, 701 (9th Cir.2001)). In fact, proximate cause is defeated by the existence of more-direct victims who can be counted on to vindicate the law as private attorneys general. *Id.* Plaintiff's discovery seeks information concerning WinCo Defendants' dealings with the employee associations at all WinCo stores. His relationship with Defendants, however, arises from his employment at WinCo Store No. 1 and his membership in the Employment Association. Thus, even if WinCo Defendants violated § 186 at another WinCo store, that store's employees would be more direct victims than Plaintiff.

Therefore, the Court is going to adopt a two-tier approach

to Plaintiff's discovery regarding his RICO claims against WinCo Defendants. Plaintiff will be allowed to pursue discovery against WinCo Defendants regarding their alleged § 186 violations at WinCo Store No. 1 prior to January 18, 2002. If Plaintiff can establish any merit to his assertions of WinCo Defendants' RICO violations during this time frame, and if he can show that RICO predicate acts may be prevalent chain-wide, then the scope of discovery may be expanded upon proper application. See *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d 1217, 1219 (9th Cir.1995) (acknowledging that district courts have discretion for modification of a protective order).

(2) Plaintiff's civil rights claims.

Although Counts 15 and 16 of Plaintiff's Second Amended Complaint were dismissed by the District Court, dismissal of Count 15 was never appealed and the Ninth Circuit Court of Appeals only reversed the dismissal of Count 16. See Ninth Circuit Mem., Docket No. 125. Thus, Plaintiff's discovery concerning any alleged civil rights violations by Defendants is limited to his 42 U.S.C. § 1981 claim that the WinCo Defendants terminated him based on his race, color, national origin, alienage, ethnic character, and/or ancestry, when it treated white, American born citizens more favorably. Second Am. Compl., ¶¶ 202–04, Docket No. 165–2.

This Court has previously addressed the issue of whether to grant a defendant's motion for protective order prohibiting discovery of "comparables" in an action where the plaintiff claimed that he was terminated in violation of public policy. *Purkey v. Rubino*, 2006 WL 3497267 at *6. In *Purkey*, this Court granted the defendants' motion for *651 protective order because the plaintiff did not have to prove disparate treatment by comparison with similarly situated employees. *Id.* In this case, however, Plaintiff claims that a white woman, who was allegedly involved in the incident which led to his termination, was not disciplined for advising Plaintiff that he could sell the alcohol, while Plaintiff, a black male, was disciplined. Second Am. Compl., ¶¶ 14–19, Docket No. 165–2. As explained below, Plaintiff's discovery concerning similarly situated employees may be relevant to his § 1981 claim.

¹⁸¹ The Ninth Circuit has held that employment discrimination claims brought under § 1981 follow the same legal principles as those applicable in Title VII disparate treatment cases. *Fonseca v. Sysco Food Servs. of Arizona, Inc.*, 374 F.3d 840, 850 (9th Cir.2004). To

prove employment discrimination under either, the claimant must show that: “(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) *similarly situated individuals outside his protected class were treated more favorably*, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination.” *Id.* at 847 (quoting *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 604 (9th Cir.2004) (emphasis added)). To prove the fourth element, a claimant must show, at the least, that the employees that were treated more favorably were similarly situated to claimant in all material respects. *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir.2006).

This Court has noted that “[e]ven in Title VII cases and other employment discrimination cases, courts have not given unfettered access to personnel records.” *Purkey*, 2006 WL 3497267 at *6 (citing *Pacheco v. Mineta*, 448 F.3d 783, 793 (5th Cir.2006) (upholding denial of employee’s broad discovery request for information on all promotions extending back five years before the policy of which he complained was implemented, noting it was a broad and largely irrelevant discovery request)); *Sallis v. Univ. of Minn.*, 408 F.3d 470, 477–78 (8th Cir.2005) (university employee’s request for information on every allegation of employment discrimination against university, by all complainants in all departments, was overly broad and unduly burdensome in Title VII action). In dictum, this Court held that the party seeking production of “comparable” documents must show that the information is relevant and that the relevant information cannot be obtained by less intrusive means. *Id.*

¹⁹¹ Plaintiff’s allegation that a white, female employee was not disciplined for her involvement in the sale of the alcohol raises both gender and racial discrimination claims. *See* Second Am. Compl., ¶¶ 14–19, Docket No. 165–2. The Court finds that WinCo Defendants’ treatment of any employees who have illegally sold alcohol at WinCo Store No. 1 may be relevant to Plaintiff’s § 1981 claim. Thus, Plaintiff is entitled to discovery concerning WinCo Defendants’ treatment of WinCo Store No. 1 employees who illegally sold alcohol from October 5, 1998 to the date of the filing of this action.

(3) Plaintiff’s LMRDA and common law fiduciary duty claims.

Defendants argue that Plaintiff’s discovery regarding his LMRDA claims should be limited to the period of time

that he was a “member” of the Employee Association. *See* Employee Defs.’ Mem. Supp. Mot. Protective Order, at 10–11, Docket No. 183–4; WinCo Defs.’ Mem. Supp. Mot. Protective Order, at 12, Docket No. 181–2. They allege that Plaintiff’s membership with the Employee Association began when he started working at WinCo Store No. 1 and ended when he ceased pursuing his internal grievance on January 18, 2002. *Id.*

(a) Plaintiff’s membership status in the Employee Association.

¹¹⁰¹ The LMRDA defines member, or member of good standing, of a labor organization as “any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.” 29 U.S.C. § 402(o). Persons who have fulfilled the requirements of union membership are members under the LMRDA even if the labor organization *652 doesn’t recognize their membership. *Brennan v. Local 357, Int’l. Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 709 F.2d 611, 614 (9th Cir.1983). Where an individual has not complied with the labor organization’s membership requirements, however, that individual may not obtain relief under the LMRDA. *Id.*

All parties agree that Plaintiff’s employment at WinCo Store No. 1 as a non-supervisory employee was the only requirement that he had to meet to become a member of the Employee Association. *See* Pl.’s Resp. to Employee Defs.’ Mot., at 8–9, Docket No. 194; Pl.’s Resp. to WinCo Defs.’ Mot., at 7, Docket No. 195; WinCo Defs.’ Reply to Pl.’s Resp., at 1–2, Docket No. 211; Employee Defs.’ Reply to Pl.’s Resp., at 3, Docket No. 213; *see also* WinCo Defs.’ Mem. Supp. Mot. Dismiss, at 47, Docket No. 47, Ex. A (“WinCo recognizes this specific store Employee Association as the collective bargaining representative for the purpose of establishing wages, hours and conditions of employment *for all non-management employees.*”) (emphasis added). Thus, Plaintiff met the Employee Association’s requirements for membership when he started working as a non-supervisory employee at WinCo Store No. 1.

¹¹¹¹ The Ninth Circuit has held that membership, as defined by the LMRDA, continues “until one of two events occurs: (1) the member voluntarily withdraws from the union, or (2) the union expels or suspends the member

after appropriate proceedings held pursuant to lawful constitutional or bylaw provisions.” *Brennan*, 709 F.2d at 615. Defendants argue that Plaintiff’s membership in the Employee Association ceased when he was terminated, or at the latest, when he failed to exhaust the Employee Association’s internal grievance process after his hearing on January 18, 2002. Employee Defs.’ Mem. Supp. Mot. Protective Order, at 10 n. 7, Docket No. 183–4; WinCo Defs.’ Mem. Supp. Mot. Protective Order, at 12, Docket No. 181–2. Conversely, Plaintiff argues that he has not voluntarily withdrawn his membership, or been expelled or suspended from the Employee Association. Pl.’s Resp. to Employee Defs.’ Mot., at 9, Docket No. 194; Pl.’s Resp. to WinCo Defs.’ Mot., at 8, Docket No. 195.

Defendants have not argued that Plaintiff was expelled or suspended from his membership in the Employee Association. Their argument that Plaintiff is no longer a member of the Employee Association hinges on his voluntary membership withdrawal. Although relatively few LMRDA cases have concerned voluntary withdrawal of union membership, courts generally construe member resignations narrowly in union cases. *Basilicato v. Int’l Alliance of Theatrical Stage Employees and Moving Motion Picture Machine Operators of the U.S. and Can.*, 479 F.Supp. 1232, 1243 (D.Conn.1979); see also *Int’l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers v. Local Lodge 714*, 696 F.Supp. 391, 393 (N.D.Ill.1988) (requiring withdrawal by clear manifestation of intent to voluntarily terminate union membership where union constitution lacks resignation or disaffiliation provisions).

As stated above, Plaintiff argues that he has not voluntarily withdrawn his membership in the Employee Association. Pl.’s Resp. to Employee Defs.’ Mot., at 9, Docket No. 194; Pl.’s Resp. to WinCo Defs.’ Mot., at 8, Docket No. 195. His contention is further supported by the fact that he seeks reinstatement as a WinCo employee in his prayer for relief. See Second Am. Compl., at 48, Docket No. 165–2. The Court has not been provided with any evidence that an Employee Association member’s failure to exhaust its internal dispute resolution procedures results in a voluntary withdrawal or termination of membership. In evaluating Plaintiff’s scope of discovery, the Court finds that Plaintiff is a current member of the Employee Association. Also, as agreed to by the parties, Plaintiff’s membership in the Employee Association started on April 30, 1999, when he was hired at WinCo Store No. 1.

(b) *Scope of discovery for Plaintiff’s 29 U.S.C. § 501 claim.*

^{112]} The LMRDA outlines fiduciary duties of union officials, and permits union members to sue on behalf of the union for breach of those duties in 29 U.S.C. § 501. *653 *O’Hara v. Teamsters Union Local # 856*, 151 F.3d 1152, 1161 (9th Cir.1998). Standing to bring such claims is stated as follows:

When any ... representative of any labor organization is alleged to have violated ... [§ 501(a)] ... and the labor organization or its governing board or officers refuse or fail to sue or recover damages ... or other appropriate relief within a reasonable time *after being requested to do so by any member of the labor organization*, such member may sue such ... representative ... to recover damages or ... other appropriate relieve *for the benefit of the labor organization*.

29 U.S.C. § 501(b) (emphasis added). The Ninth Circuit has construed § 501(b) to expressly provide that, “under the appropriate circumstances, a union member can file suit for appropriate relief with respect to a violation of section 501(a).” *Brock v. Mazzola*, 794 F.2d 427, 430 (9th Cir.1986) (emphasis added). It recognizes, however, that § 501 claims are similar to shareholder derivative actions because the relief obtained benefits the union as a whole rather than the individual bringing the claim. *O’Hara*, 151 F.3d at 1161.

In Plaintiff’s Second Amended Complaint, he seeks such relief “as the Court deems just and equitable as to any and all causes of action, including, but not limited to, ... a declaratory judgment that Defendants ... have violated the LMRDA ... and/or have breached (or unlawfully assisted in the breach of) fiduciary and/or agency duties; and, affirmative or injunctive relief as to any and all of those violations, as appropriate.” Second Am. Compl., at 48, Docket No. 165–2.

^{113]} Since Plaintiff seeks declaratory and injunctive relief which could inure to the benefit of the Employee Association, the result, assuming the Employee Association has not complied with § 501, is that they do so in the future. Although the Employee Association was

not created until April 20, 2000, the Court will allow Plaintiff to conduct discovery concerning Defendants' alleged § 501 violations starting on October 5, 1998, when WinCo Store No. 1 opened. This will allow Plaintiff to explore the preliminary negotiations that resulted in the creation of the Employee Association. Also, because the Court has found that Plaintiff is still a current member, he has standing under § 501 to pursue discovery in this area until the present time.

Plaintiff's common law fiduciary claims against Defendants arise from his LMRDA fiduciary duty claims. *See* Ninth Circuit Mem., at 2, Docket No. 125. Thus, Plaintiff's discovery regarding his common law fiduciary claims against Defendants is limited to the same extent as his § 501 claims.

(c) Scope of discovery for Plaintiff's 29 U.S.C. § 411 and § 415 claims.

¹¹⁴¹ Plaintiff has also alleged that Defendants violated Title I of the LMRDA [29 U.S.C. §§ 411–415] under 29 U.S.C. §§ 411(a)(1), (a)(2), (a)(4), and 415. Second Am. Compl., at 12–14, Docket No. 165–2. Each of these sections confers rights only on members of a labor organization. *See* 29 U.S.C. § 411(a)(1) (“Every *member* of a labor organization shall have equal rights and privileges ...”) (emphasis added); 29 U.S.C. § 411(a)(2) (“Every *member* of any labor organization shall have the right to meet and assemble freely with other members ...”) (emphasis added); 29 U.S.C. § 411(a)(4) (“No labor organization shall limit the right of any *member* thereof to institute an action in any court ...”) (emphasis added); 29 U.S.C. § 415 (“Every labor organization shall inform its *members* concerning the provisions of this chapter.”) (emphasis added).

Unlike § 501(b), which limits relief to a labor organization, any person whose Title I rights have been violated may bring a civil action in a United States district court for relief. *See* 29 U.S.C. § 412. Thus, Plaintiff's §§ 411 and 415 are brought individually, rather than on behalf of the Employee Association.

Plaintiff's discovery concerning Employee Association Defendants' alleged §§ 411 and 415 violations is irrelevant for the time period before his membership in the Employee Association started. As the parties agree, Plaintiff has been a member of the Employee Association since April 30, 1999, when he was hired by WinCo Store No. 1. Although Plaintiff is still a member of the Employee Association, he has not asserted any active

involvement as a member since January 18, 2002. Thus, it is difficult to imagine how Plaintiff *654 could have been individually harmed by any violations of §§ 411 and 415 by Employee Association Defendants after that time. The Court, however, will extend the relevant period of Plaintiff's discovery relating to Employee Association Defendants' alleged §§ 411 and 415 violations to August 15, 2002, when Plaintiff first brought this action.

B. Discovery of WinCo Defendants' indemnification, and payment of defense cost for claims asserted against WinCo employee associations.

(1) WinCo Defendants' indemnification and payment of defense costs.

Plaintiff has proposed discovery seeking information on WinCo Defendants' indemnification, and/or payment of defense costs regarding Employee Association Defendants and other WinCo store employee associations. *See* Ex. A–Q WinCo Defs.' Mem. Supp., Docket No. 181–3, Ex. M; Employee Defs.' Mem. Supp. Mot. Protective Order, Docket No. 183–4, Ex. A. The Court finds that Plaintiff's requests concerning WinCo Defendants' payments of any WinCo employee association defense costs are relevant primarily to his RICO claims. The geographic and temporal scope of any such discovery is therefore limited by the scope of Plaintiff's RICO claims as discussed earlier.

WinCo Defendants have already stated that they never indemnified Employee Association Defendants within the geographic and temporal scope of discovery for Plaintiff's RICO claims. Ex. A–Q WinCo Defs.' Mem. Supp., at 75, Docket No. 181–3, Ex. Q. WinCo Defendants also disclosed that they are paying Employee Association Defendants' legal fees in this case pursuant to an agreement. *Id.* They noted, however, that to their knowledge, no other employee or ex-employee had asserted a claim against Employee Association Defendants within the temporal scope of discovery concerning Plaintiff's RICO claims. *Id.* The Court finds that this statement fulfills Defendants' discovery obligations concerning WinCo Defendants' payment of employee association defense costs in this case at this time. Plaintiff is restricted from any further discovery on this issue unless he successfully expands the geographic and temporal scope of discovery on his RICO claims through a motion to modify this protective order.

(2) Detailed information concerning Defendants' representation.

Plaintiff also seeks information regarding bills, billing documents, and representation agreements between Employee Association Defendants and Sasser & Inglis, P.C., or any other law firm. Ex. A–Q WinCo Defs.' Mem. Supp., Docket No. 181–3, Ex. M; Employee Defs.' Mem. Supp. Mot. Protective Order, Docket No. 183–4, Ex. A. Defendants argue that any such information is protected under the attorney-client privilege. WinCo Defs.' Reply to Pl.'s Resp., at 6–7, Docket No. 211; Employee Defs.' Reply to Pl.'s Resp., at 6–9, Docket No. 213.

[15] [16] The Ninth Circuit has stated that communications between attorney and client that concern “the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege.” *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir.1992). It clearly held, however, that “correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege.” *Id.* Thus, Plaintiff's discovery seeking detailed information of bills, billing documents, and agreements between Employee Association Defendants and their attorney falls within the attorney-client privilege and is prohibited.

Further, it is clear that Sasser & Inglis, P.C. has represented Employee Association Defendants *after* this case was filed for purposes of this litigation. Thus, Plaintiff's argument that the crime-fraud exception allows him to pierce the attorney-client relationship is to no avail. There is absolutely no evidence that prior to this lawsuit the law firm ever counseled the Employee Association Defendants to engage or participate in some sort of fraud. For the same reason, Plaintiff fails in his argument that the *Garner* exception *655 to the attorney-client privilege applies in this case. Also, as Plaintiff concedes, the Ninth Circuit has never affirmatively applied the *Garner* exception.

In any event, WinCo Defendants have already disclosed all information relevant to Plaintiff's claims in their statement concerning the indemnification and payment of defense costs for Employee Association Defendants. Plaintiff's requests seeking detailed information from the bills, billing documents, and agreements between

Employee Association Defendants and their attorney is protected and the fact that such a relationship exists has already been acknowledged.

C. Specific issues concerning the scope of Plaintiff's discovery beyond the general scope limitation.

In addition to the general scope limitations discussed above, the Court has made the following findings concerning Defendants' specific objections to requests made by Plaintiff for his proposed 30(b)(6) depositions. See Pl.'s Resp. to WinCo Defs.' Mot., at 12–27, Docket No 195. Although the Court specifically addresses Plaintiff's requests to WinCo Defendants, these findings also apply to Employee Association Defendants. In the Court's view, the objections raised by WinCo Defendants were sufficient to cover Plaintiff's requests to Employee Association Defendants.

Request No. 24 is prohibited to the extent that it seeks information outside the scope of discovery for Plaintiff's claims under 29 U.S.C. § 501.

Request No. 42 is only allowed for the purpose of establishing Plaintiff's damages by showing what he would have been entitled to if he had remained a WinCo employee. Defendants' may prepare a summary sheet for the purpose of answering this request.

Request No. 43 is prohibited to the extent that it seeks information that is not related to WinCo's policy concerning the sale of alcohol, or any disciplinary policies that are not covered in the Employee Agreement.

Request Nos. 30 and 32 are prohibited to the extent that they seek information outside the scope of discovery for Plaintiff's claims under 29 U.S.C. § 501.

Request No. 49 is prohibited because it is irrelevant to Plaintiff's claims.

Request No. 50 is only allowed for the purpose of establishing Plaintiff's damages by showing what he would have been entitled to if he had remained a WinCo employee. Defendants' may prepare a summary sheet for the purpose of answering this request.

Request No. 51 is prohibited because it is irrelevant to Plaintiff's claims.

Request No. 54 is prohibited to the extent that it seeks information outside the scope of discovery for Plaintiff's

RICO claims.

Request No. 52 is prohibited because it is overly broad and unduly burdensome.

Request No. 53 is prohibited to the extent that it seeks information outside the scope of discovery for Plaintiff's RICO claims.

Request Nos. 56 and 57 are prohibited because they are overly broad and unduly burdensome.

Request No. 41 is prohibited to the extent that it seeks information outside the scope of discovery for Plaintiff's claims under 29 U.S.C. § 501.

Request No. 46 is prohibited except that Plaintiff may inquire as to documents produced.

Request No. 47 is prohibited except that Plaintiff may inquire as to Defendants' defenses in this action.

Request No. 55 is prohibited except that Plaintiff may seek information regarding WinCo Store No. 1, during the time prior to August 15, 2002 when Plaintiff filed his Complaint. Also, Plaintiff conceded at the January 31, 2008 hearing that he will not seek information regarding corresponding pay rates.

Request No. 58 is prohibited except that Plaintiff may seek information regarding WinCo Store No. 1, during the time prior to August 15, 2002 when Plaintiff filed his Complaint.

Request Nos. 26–28, 33, 39, 44, and 45 have already been addressed by the Court. Defendants have already provided all relevant information to Plaintiff regarding these requests.

*656 *Request No. 17* is moot because Plaintiff has already informed Defendants that he does not expect them to be prepared to answer during their 30(b)(6) depositions.

D. Defendants' objection to Plaintiff's depositions of Messrs. Long and Cochell due to timeliness.

WinCo Defendants seek to bar Plaintiff's proposed depositions of Bill Long and Roger Cochell because they were not noticed until December 5, 2007, which they consider too close to the December 17, 2007 discovery cut-off. WinCo Defs.' Mem. Supp. Mot. Protective Order, at 27–28, Docket No. 181–2. Although they do not move

to bar Plaintiff's other proposed depositions, for which they acknowledge receiving notice on December 3, 2007, they seek scheduling of those depositions at dates and times mutually-agreeable to counsel, during normal business hours, and within a seven-hour limit for each deposition. *Id.* Plaintiff only challenges WinCo Defendants' motion to bar his proposed depositions of Messrs. Long and Cochell. Pl.'s Resp. to WinCo Defs.' Mot., at 28, Docket No. 195. He claims that WinCo Defendants were not noticed of the Long and Cochell depositions until December 5 because he thought they would be named as WinCo Defendants' 30(b)(6) deponents. *Id.* at 31. He further asserts that WinCo Defendants never notified him who their 30(b)(6) deponents would be. *Id.* at 32.

¹¹⁷¹ Although Rule 30(b)(1) requires that reasonable notice of depositions be given, the court must determine what is reasonable based on the circumstances of a particular case. *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 320, 327 (N.D.Ill.2005). Courts should consider "the time between the notice and the deposition, with an eye towards preparation and travel." *Id.* The opposing party, however, has no basis to complain where it has concealed the identities of the witnesses until late in the game. *Id.* In *Sulfuric Acid*, the court also implied that notice of 10 business days would generally be deemed reasonable. *Id.*

¹¹⁸¹ ¹¹⁹¹ In this case, Plaintiff gave notice concerning the depositions of Messrs. Long and Cochell just eight business days prior to the discovery cut-off. Plaintiff argues that he thought Mr. Cochell would be named as WinCo Defendants' 30(b)(6) deponent. Aside from Plaintiff's subjective belief in this area, the Court will allow this deposition because of Mr. Cochell's former position as WinCo's Vice President of Labor and Human Resources and he signed the Employee Agreement as WinCo's representative. Conversely, the Court is not convinced that Plaintiff expected Mr. Long, the former CEO, to act as their 30(b)(6) deponent or that he has sufficient knowledge of the relevant issues in this case to require his deposition. If Plaintiff discovers information that Mr. Long has information that is relevant to the issues of his case or likely to lead to relevant evidence, this Court will consider scheduling his deposition.

E. Plaintiff's motion for protective order.

¹²⁰¹ Plaintiff seeks a protective order on his answers and responses to Defendants' written discovery until completion of their outstanding depositions. Pl.'s Mot. Protective Order, at 2, Docket No. 187. He claims that

Defendants did not appear for any of their noticed depositions and that they unreasonably moved to protect portions of them. *Id.* Based on these allegations, he argues that it is unfair to require his response before Defendants' noticed depositions have been completed. *Id.* WinCo Defendants counter that Plaintiff has not met his burden of showing a particular and specific demonstration of fact that a protective order is necessary. WinCo Defs.' Resp. to Pl.'s Mot., at 3, Docket No. 199; *see also Terra Int'l, Inc.*, 134 F.3d at 306. They also note that "unless the court orders otherwise for the parties convenience ... and in the interests of justice: (A) methods of discovery shall be used in any sequence; and (B) discovery by one party does not require any other party to delay its discovery." Fed.R.Civ.P. 26(d)(2).

Plaintiff's motion for a protective order is denied because he has not specifically shown a reason that it would be necessary. Because the Court finds merit in Defendants' motions for protective orders, it does find it unreasonable that Defendants did not appear for Plaintiff's scheduled depositions.

***657 III.**

Plaintiff's Counsel as Expert Witness.

¹²¹¹ The Court addressed Defendants' motion to bar Plaintiff's counsel, Mr. Schwarzkopf, from acting as an expert in this case at the hearing on January 31, 2008. Although the Court held that Mr. Schwarzkopf cannot act as both Plaintiff's expert witness and trial counsel, it granted Plaintiff 10 days to propose another attorney to act as Plaintiff's attorney at trial. Despite being directed by the Court to respond within 10 days, Plaintiff has neither proposed another attorney to act as trial counsel in this action, or notified the Court that Mr. Schwarzkopf

will not be acting as his expert witness. The Court will grant Defendants' motion to strike Mr. Schwarzkopf as his expert witness.

Because the Court has barred Plaintiff's only proposed expert witness in this trial, Employee Association Defendants' motion for an extension of time to rebut Plaintiff's expert is moot.

ORDER

Based on the foregoing, the Court being otherwise fully advised in the premises, **IT IS HEREBY ORDERED that:**

1) WinCo Defendants' Motion for Protective Order (Docket No. 181) is hereby GRANTED in part and DENIED in part.

2) Employee Association Defendants' Motion for Protective Order (Docket No. 183) is hereby GRANTED in part and DENIED in part.

3) Plaintiff's Motion for Protective Order (Docket No. 187) is hereby DENIED. Plaintiff shall respond to Defendants written discovery within twenty (20) days from the date of this Order.

4) WinCo Defendants' Motion to Strike Plaintiff's Expert Witness (Docket No. 173) is hereby GRANTED.

5) Employee Association Defendants' Motion for Extension of Time (Docket No. 175) is hereby declared MOOT.

All Citations

249 F.R.D. 643

Footnotes

1 Based on representations by Plaintiff's counsel at the hearing dated January 31, 2008, the Court understands that the Employee Agreement was the first such agreement at WinCo Store No. 1.

2 The District Court's dismissal of Count 15 of Plaintiff's Complaint was not appealed or reversed by the Ninth Circuit. Ninth Circuit Mem., Docket No. 125. Thus, Plaintiff's civil rights claims are limited to Count 16 of his Second Amended Complaint which alleges that WinCo Defendants' termination of him violated 42 U.S.C. § 1981. Second Am. Compl., ¶¶ 202-04, Docket No. 165-2.

3 This Court denied Plaintiff's motion to certify a class action on March 29, 2007. *See* Mem. Order, Docket No. 161.

End of Document

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7 Attorneys for Plaintiff Terri Jo Neff

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

9 **IN AND FOR THE COUNTY OF COCHISE**

10 TERRI JO NEFF, a single woman,

No. CV201900323

11 Plaintiff,

NOTICE OF HEARING

12 vs.

13
14 COCHISE COUNTY; COCHISE COUNTY
15 BOARD OF SUPERIVORS; ARLETHE
16 RIOS, COCHISE COUNTY CLERK,

Assigned to the Hon. David Thorn, Div. III

17 Defendants.

18 **TO: ALL PARTIES**

19
20 PLEASE TAKE NOTICE that Defendants' Motion to Dismiss Plaintiff's Statutory
21 Special Action Complaint will be brought on for hearing before the court on the ____ day
22 of _____ 2019, at the hour of ____ a.m./p.m., in Courtroom ____ or as soon
23 thereafter as counsel may be heard, before the Honorable David Thorn, Div. III.

24
25 ///

26 ///

1 RESPECTFULLY SUBMITTED this 6th day of September, 2019.

2 MICHAEL J. BLOOM, P.C.

3
4 

5 Michael J. Bloom

6 Attorney for Plaintiff Terri Jo Neff

7 Original of the foregoing Federal Expressed for lodging
8 this 6th day of September, 2019, with:

9 Honorable David Thorn, Div. III
10 Cochise County Superior Court
11 100 Colonia de Salud, #202
12 Sierra Vista, Arizona 85636

13 Copy of the foregoing mailed and emailed
14 this 6th day of September, 2019, to:

15 Christine J. Roberts
16 Civil Deputy County Attorney
17 Cochise County Attorney's Office
18 P.O. Drawer CA
19 Bisbee, Arizona 85603
20 CVAttymeo@cochise.az.gov
21 Attorney for Defendants

22 

23 By: _____

24 Maria C. Chavez Romero
25
26